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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA, New York, N.Y.
5 v. 20 Cr.160 (MKV)

6 MARCOS ZULUETA,
7 -----x

8 Defendant.
9

10 Before:
11 HON. MARY KAY VYSKOCIL,
12 U.S. District Judge
13

14 APPEARANCES

15 DAMIAN WILLIAMS
16 United States Attorney for the
17 BY: ANDEN F. CHOW
18 Southern District of New York
19 Assistant United States Attorney

20 ROBERT E. GOLDMAN, LLC
21 Attorneys for Defendant
22 BY: ROBERT E. GOLDMAN

23 ALSO PRESENT: GABRIEL MITRE, Spanish Interpreter
24 BRUCE TURPIN, Special Agent, FBI
25

M2o5zuls

1 (Case called)

2 THE DEPUTY CLERK: Counsel, starting with the
3 government, please state your name for the record.4 MR. CHOW: Anden Chow for the government. Good
5 morning, your Honor.

6 THE COURT: Good morning, Mr. Chow.

7 MR. CHOW: With me today is special agent Bruce Turpin
8 with the FBI.

9 THE COURT: Good morning Special Agent Turpin.

10 AGENT TURPIN: Good morning, your Honor.

11 For the defendant?

12 MR. GOLDMAN: Yes. Robert Goldman, your Honor, good
13 morning.

14 THE COURT: Good morning.

15 And you are Mr. Zulueta?

16 THE DEFENDANT: (In English) Good morning.

17 THE COURT: Good morning. Please, be seated.

18 And good morning to our court reporter Ms. Utter.
19 Thank you for being here.20 So we are here this morning for the sentencing of
21 Mr. Zulueta. As you know, I am Judge Vyscocil, and I have been
22 presiding over this case. Before we get to the substance,
23 Mr. Zulueta, I understand that you have requested that there be
24 an interpreter available today?

25 THE DEFENDANT: (In English) Yes.

M2o5zulS

1 THE COURT: And we do have an interpreter on standby
2 as I understand it, correct?

3 INTERPRETER: Yes, Judge.

4 THE COURT: Are you not simultaneously translating
5 everything?

6 INTERPRETER: I am currently not at the request of the
7 defendant and his counsel, Judge, but I am prepared to do so at
8 any time.

9 THE COURT: Mr. Goldman, I would like you to make a
10 record on this, please.

11 I want to just note two things. Mr. Zulueta did
12 request that we have an interpreter on standby at his plea and
13 we did do that.

14 MR. GOLDMAN: Yes.

15 THE COURT: We have somebody here today, should
16 Mr. Zulueta request that, but I also note that in a lot of the
17 transcribed calls that are part of the record today in which
18 Mr. Zulueta was conferring with Jorge Navarro -- both of whom
19 are apparently native Spanish speakers -- they communicated in
20 English.

21 Is that correct, Mr. Chow?

22 MR. CHOW: That is correct, your Honor.

23 THE COURT: So, Mr. Goldman, I don't know how you want
24 to handle the issue of an interpreter.

25 MR. GOLDMAN: Yes, your Honor.

M2o5zulS

1 THE COURT: Clearly, Mr. Zulueta is entitled to it if
2 he wishes.

3 MR. GOLDMAN: Your Honor, we are doing this for
4 cautionary purposes. There is times when certain words or
5 legal terms or whatever might be difficult for my client to
6 understand in the English language. I have always been able to
7 communicate with him in English. This is just to be cautious
8 and to not to delay the proceedings in case something comes up.

9 THE COURT: Yes, of course.

10 I mean, Mr. Zulueta, it is very important that you
11 understand what I am saying to you today and what the
12 government and your lawyer will put on the record. So if at
13 any time, at any point you need the assistance of an
14 interpreter, you need to please let Mr. Goldman know and he
15 will advise the Court.

16 THE DEFENDANT: (In English) Yes, your Honor.

17 THE COURT: Do you want simultaneous translation of
18 everything?

19 THE DEFENDANT: (In English) No. I -- when I don't
20 understand some word that's when I need, you know -- I need to
21 explain me. I can understand it maybe 75 percent, 80 percent.

22 THE COURT: All right. So you will let us know --

23 THE DEFENDANT: (In English) Yes, your Honor.

24 THE COURT: -- if you need an interpreter, correct?

25 THE DEFENDANT: (In English) Yes, your Honor.

M2o5zulS

1 THE COURT: Thank you. You may be seated.

2 I will also say before we get going that everyone can
3 remain seated until I impose judgment, at which point I will
4 ask you, Mr. Zulueta, to stand. But, otherwise, please remain
5 seated because the microphones pick you up much more clearly
6 when you are seated.

7 For the record, Mr. Zulueta pled guilty on October
8 15th, 2021, pursuant to an agreement with the government, to
9 one count of drug adulteration and misbranding with intent to
10 defraud in violation of Title 21, United States Code,
11 Section 331 and 333A2. Since then, the probation office has
12 met with Mr. Zulueta in the presence of his counsel. It has
13 completed its investigation. I have the presentence report
14 together with the submissions filed by both sides.

15 For the record, the following have been submitted and
16 I am going to ask you to confirm at the conclusion that what I
17 am reciting is the complete and accurate record before me.

18 So I have the final presentence report filed on
19 October 6th, 2022, at ECF 638. I have defendant's sentencing
20 submission filed on February 11, 2022, at ECF 766. That
21 initial submission enclosed seven letters of support. On
22 February 22nd, I received a further submission from defense
23 counsel that enclosed eight additional letters including a
24 letter from Mr. Zulueta, and that is filed at ECF 781. I just
25 note that one of those letters had already been submitted with

M2o5zulS

1 the initial submission. Today Mr. Goldman has provided to the
2 Court one additional letter in support of Mr. Zulueta.

3 The government's sentencing submission was filed on
4 February 17th, 2022, and that is on the docket at ECF 773. It
5 attaches two exhibits, A and B, both of which are under seal.

6 Mr. Chow, the submission itself is not under seal,
7 correct?

8 MR. CHOW: That is correct.

9 THE COURT: So let me confirm with both sides that
10 this is the totality of the record before the Court.

11 Mr. Goldman?

12 MR. GOLDMAN: Yes, your Honor.

13 THE COURT: Mr. Chow?

14 MR. CHOW: Yes, your Honor.

15 THE COURT: Thank you.

16 Mr. Goldman, would you confirm for me, please, have
17 you had a full opportunity to read the presentence report, to
18 discuss it with Mr. Zulueta, and to lodge any objections?

19 MR. GOLDMAN: We have, your Honor.

20 THE COURT: Mr. Zulueta, have you read the presentence
21 report?

22 THE DEFENDANT: (In English) Yes, your Honor.

23 THE COURT: Have you discussed it with Mr. Goldman?

24 THE DEFENDANT: (In English) Yes, your Honor.

25 THE COURT: Have you had all the time you need to

M2o5zulS

1 discuss it with your lawyer?

2 THE DEFENDANT: (In English) Yes, your Honor.

3 THE COURT: And you have had time to raise any
4 concerns or objections?

5 THE DEFENDANT: (In English) Yes, your Honor.

6 THE COURT: Mr. Chow, has the government had an
7 opportunity to read the report and to tender any objections?

8 MR. CHOW: Yes, your Honor.

9 THE COURT: I have a couple of questions I would like
10 to -- or a couple of issues I would like to review with the
11 parties before accepting the report.

12 First, Mr. Goldman, would you please confirm for me
13 that you have read and specifically discussed with Mr. Zulueta
14 the proposed conditions of supervised release which are set
15 forth in the PSR at pages 37 through 39?

16 MR. GOLDMAN: I have, your Honor.

17 THE COURT: And are you comfortable with me referring
18 to them generically as the standard and mandatory conditions
19 and not putting them verbatim on the record?

20 MR. GOLDMAN: Certainly, your Honor.

21 THE COURT: Thank you.

22 Mr. Chow, does the government still believe that
23 Mr. Zulueta is entitled to the two-level reduction in the
24 offense level calculation based on his clearly demonstrated
25 acceptance of responsibility?

M2o5zulS

1 MR. CHOW: Yes, your Honor.

2 THE COURT: And does the government now move for a
3 further one-level reduction pursuant to Section 3E1.1(b) by
4 reason of defendant's timely notice of his intention to enter a
5 plea of guilty?

6 MR. CHOW: It does, your Honor.

7 THE COURT: That motion is granted.

8 So let me just confirm for the record that it is
9 Court's understanding that neither party has any objection to
10 the PSR, and I note specifically that that is even though the
11 PSR guidelines calculation is different than that which the
12 parties agree to in the plea agreement.

13 Mr. Goldman, is that correct? No objection to the
14 PSR?

15 MR. GOLDMAN: That's correct, your Honor.

16 THE COURT: Government?

17 MR. CHOW: That's correct, your Honor.

18 THE COURT: There are no objections to the PSR and I
19 will therefore adopt the PSR and the factual findings and the
20 guidelines calculation therein. Again, I note that the
21 stipulated guidelines range in the plea agreement does not
22 match what is set forth in the PSR calculation, but the parties
23 do agree that the guidelines range in the PSR is correct. I
24 will also note for the record that what is in the PSR matches
25 the Court's own independent calculation of the guidelines range

M2o5zulS

1 which I am obligated to make. So, I adopt the PSR in full, it
2 will be made part of the record in this case, and placed under
3 seal. If an appeal is taken, counsel on appeal may have access
4 to the sealed PSR report without further application to the
5 Court.

6 So, does the government wish to be heard at this time?

7 MR. CHOW: Briefly, your Honor.

8 I believe the government has set forth a fulsome
9 recitation of the facts in its argument for why it believes a
10 sentence within the calculated guidelines range of the plea
11 agreement is appropriate in this case.

12 I do want to emphasize two aspects about this case.

13 The first is that this case is a constant reminder of the
14 perversion of everything noble by greed. Throughout the
15 submission and the letters of support submitted by the defense
16 there are a multitude of references to how hard it was for the
17 defendant to pull himself up from his hardscrabble upbringings
18 and it was his hard work and determination that brought him
19 into this country and gave him a foothold. And these are truly
20 laudable characteristics. But, as it turns out, it wasn't
21 enough for this defendant.

22 The crime at issue was not one of desperation or need.
23 It was greed. This was wanting a million dollar business the
24 easy way. By cheating. He wanted the recognition, the
25 respect, the money associated with winning, but was no longer

M2o5zulS

1 willing to do it the hard way, the way that all other
2 law-abiding citizens have to do it.

3 And so, along the way, he abandoned another important
4 attribute, and this is referenced throughout the letters, about
5 how he demonstrated care for the horses under his charge. But,
6 as evidenced by the intercepted communications in this case,
7 they show how far he has strayed. Endangering horses, nearly
8 killing them, this no longer phased him, and in the process he
9 normalized the systemic abuse of these animals. He no longer
10 prioritized their health, he no longer cared that he was
11 abusing them. He was treating them as no more than tools or
12 machines that he could manipulate to win. And for these two
13 reasons, and all the other reasons set forth in the
14 government's submission, the government respectfully submits
15 that a sentence within the guidelines range set forth in the
16 plea agreement would be appropriate in this particular case.

17 THE COURT: Thank you.

18 Mr. Goldman, would you like to be heard?

19 MR. GOLDMAN: Yes, your Honor. Do you mind if I
20 stand?

21 THE COURT: Sure. Whatever you are more comfortable
22 with but you will use the podium so the microphone picks you
23 up.

24 MR. GOLDMAN: Yes. Thank you, your Honor.

25 Your Honor, the first thing I would like to address is

M2o5zulS

1 what is set forth in the presentence report, and it is my
2 belief that the Criminal History Category overstates the
3 criminal history of Mr. Zulueta, and therefore would warrant a
4 reduction down to Criminal History I.

5 THE COURT: That gets you right back to where you were
6 in the plea agreement though, right?

7 MR. GOLDMAN: Yes, but you can do that. You can do
8 that under the sentencing guidelines. It is a sentencing
9 issue --

10 THE COURT: No, I understand that. I am asking is
11 that the effect, if I were to adopt your argument?

12 MR. GOLDMAN: Yes, your Honor.

13 THE COURT: OK.

14 MR. GOLDMAN: Yes.

15 And the reason for that is the DUI. Well, there is
16 two summaries and the DUI was not a plea of guilty, and it was
17 not a finding of guilty, and has actually been expunged, it is
18 a diversionary program. In Bucks County, where he was placed
19 on that program, I was a prosecutor there and I do criminal
20 defense work there, amongst other places, and so that's -- in
21 Bucks County there is no requirement whatsoever that that
22 person acknowledges guilt. They're accepted into the
23 diversionary program and at the conclusion of six months that
24 they don't get any other arrest during that six months' period,
25 then the Court then dismisses the charges and the charges are

M2o5zulS

1 expunged except for purposes of law enforcement going back and
2 looking for the record.

3 So in reality, your Honor, we have two summaries and
4 we have a non-conviction of Mr. Zulueta for the DUI and so
5 because of that, your Honor, I think that the recommendation of
6 the probation office is warranted and, respectfully, I ask you
7 to accept that and sentence him under Criminal History I. It
8 is not a significant difference but it is a difference of three
9 months and I think it is warranted under the facts in this
10 case.

11 And I was not going to quarrel with, you know -- I am
12 not one to quarrel with presentence reports if I don't need to.
13 I didn't think I needed to in that case and I thought the
14 request for the reduction would adequately cover this.

15 So I think -- I don't know if you want to rule on that
16 now, your Honor, or at the end.

17 THE COURT: I don't need to rule on that. It's your
18 position that I can take into account. You have said you don't
19 object to the PSR. I only need to rule on objections.

20 MR. GOLDMAN: Well, your Honor, respectfully, my
21 experience is that the Court has to first decide where the
22 criminal history is.

23 THE COURT: I told you, and I will recite before
24 sentencing my calculation under the guidelines, but I told you
25 that I agree with the calculations set forth in the PSR which

M2o5zulS

1 you and the government have said you do not dispute.

2 MR. GOLDMAN: Sure, but the second step is then --

3 THE COURT: So there is nothing to rule on.

4 MR. GOLDMAN: There is, your Honor. I'm asking for a
5 reduction in the criminal history to Criminal History I because
6 it is overstated and that's to be done not in objections,
7 that's to be done as I am doing now. I am not arguing with the
8 Court.

9 THE COURT: It is part of your argument, and as you
10 have just acknowledged, I asked you, even if I were to credit
11 what you are saying, that gets you back to where you were in
12 the plea agreement with a guidelines range of 30 to 36 months,
13 correct?

14 MR. GOLDMAN: That's right.

15 THE COURT: That's what I have used as not my
16 calculation but my thought process -- which I will lay out for
17 you after I hear from you and Mr. Zulueta, if he wishes to
18 speak with me.

19 MR. GOLDMAN: OK. I just made the request that it be
20 done. Thank you.

21 But let me get to the substance here.

22 THE COURT: Yes. Please.

23 MR. GOLDMAN: It has never been --

24 THE COURT: Sorry.

25 By the way, let me say one more thing on this.

M2o5zulS

1 Regardless of the impact on the guidelines calculation which
2 is, as set forth in the PSR, correct; a DUI, whether there is a
3 conviction or not, is certainly conduct that's part of the
4 whole mix of what I am permitted to consider, correct?

5 MR. GOLDMAN: No, because it was an ARD. It is a
6 non-conviction. So, I mean, I believe you only consider
7 convictions.

8 THE COURT: OK. Go on to the rest of your position.

9 MR. GOLDMAN: The amount of time difference is not
10 worth me dwelling on this further but --

11 THE COURT: Correct.

12 MR. GOLDMAN: -- but it is necessary for me to have
13 stated it, your Honor.

14 Your Honor, what I was saying is I think you can see
15 we have never minimized in this case the seriousness of the
16 offenses. There is no doubt how serious the offense is in this
17 case and I'm not here to diminish in any way the actions of my
18 client and my client hasn't done so either. So you are dealing
19 with a balance, now, of the seriousness of the offense and now
20 we are looking at the 3553 other factors which, obviously, you
21 know, you need to consider, and to consider to see whether or
22 not a variance in the sentencing guidelines is warranted in
23 this case. And I respectfully submit to you that I believe
24 that it is warranted in this case.

25 THE COURT: Are you arguing for a variance or going

M2o5zulS

1 back to your earlier argument? I just want to note something
2 that you say in your submission -- well, the PSR does make the
3 argument that probation thinks the defendant's criminal history
4 category may substantially overrepresent the seriousness of his
5 criminal history and may warrant a departure.

6 You say in the defendant's submission: The defendant,
7 of course, "fully endorses the 'departure' to Criminal History
8 Category I recommended by the PSR."

9 Now, pursuant to the plea agreement it is my
10 understanding that the defendant agreed not to request a
11 departure.

12 MR. GOLDMAN: Judge, on this type of issue that is
13 never foreclosed by a guilty plea between the government and
14 the defense.

15 THE COURT: Notwithstanding that the plea agreement
16 was negotiated based on what your client told the government
17 about his criminal history?

18 MR. GOLDMAN: Yes, your Honor. I mean --

19 THE COURT: So he can basically be less than
20 forthcoming?

21 MR. GOLDMAN: That's not what I am saying, your Honor,
22 and that is based upon 28 years as a prosecutor, 19 as a
23 federal prosecutor, and 40-some years of doing criminal law. I
24 am submitting to this Court that in the eyes of a defense
25 attorney and as a prosecutor, as I practice as a prosecutor,

M2o5zulS

1 the first step is what are the guidelines and then if there is
2 an argument on criminal history overstating the criminal
3 history, that argument can be made. And I have never seen it
4 foreclosed by a prosecutor or by a Court.

5 THE COURT: So are you arguing, though -- I didn't
6 mean to divert you back from the substance but are you arguing
7 that this, in your view, overstatement of the criminal history,
8 warrants a departure or a variance?

9 MR. GOLDMAN: Both.

10 THE COURT: Your motion or your application for a
11 departure is denied.

12 Go ahead, though, with respect to the substance.

13 MR. GOLDMAN: Then I would ask on that, so I don't
14 have to go back, circle back to it, that it is grounds for a
15 variance from the sentencing guidelines.

16 THE COURT: You can make your -- that I don't need to
17 rule on independently.

18 MR. GOLDMAN: So what I was saying, your Honor, is
19 there is no dispute on our side or any minimization has ever
20 been raised in this case by us as far as what Mr. Zulueta did
21 and what is reflected in the government's prosecution in this
22 case but you are to sentence Mr. Zulueta as an individual and
23 clearly as different from any other defendants.

24 THE COURT: Correct.

25 MR. GOLDMAN: They're not all just lumped together and

M2o5zulS

1 just get a blanket, top-of-the-guidelines or guideline
2 sentence.

3 In this case Mr. Zulueta, as evidenced by the letters
4 that have been submitted by people that know him best,
5 reinforce the fact that he is immensely remorseful for what he
6 did, he has accepted responsibility in his community for what
7 he did, he has told people in his community what he did in this
8 case, and we wouldn't even insult the Court by coming in here
9 and asking for a probationary sentence or a house arrest
10 sentence, but I am asking for a variance in the guidelines
11 along the lines what is recommended by probation in this case.

12 Mr. Zulueta, as the Court is fully aware -- if you
13 will give me opportunity to restate this -- we all know what he
14 did bad, but we also have to reflect on the good man that he
15 is. You can have that and I am certainly aware that you know
16 this by now, handling the criminal cases, that the people
17 before the Court often present a conflicted individual, a
18 person with two sides, a person that appears in Court for
19 having done wrong and a person, who in this case, has done a
20 lot of good. And the question you heard probably from every
21 defense attorney is what is a sentence that's no greater than
22 necessary in this case.

23 Mr. Zulueta has always worked hard in his life. You
24 know well, and I don't need to spend much time on, his
25 background supporting his family in Cuba. When he came to the

M2o5zulS

1 United States he continued hard work, manual labor, continued
2 to support up until the time that he has lost his employment,
3 an extended family, including his mother and his family
4 members, still reside in Cuba.

5 Obviously your sentence needs to reflect deterrence
6 but I would respectfully submit to this Court that what's
7 happened to Mr. Zulueta by his own acts is he has lost his
8 beloved occupation and his love which was racing horses. And I
9 believe we all know that he is not going to get a license again
10 with this type of conviction.

11 He had to sell his house, he is being supported by his
12 girlfriend, he has lost the one job that he had and it is all
13 because of this case. Those are collateral consequences, he
14 brought it upon himself, but we are looking at the punishment
15 that he has already received from his actions. And so
16 respectfully, your Honor, it seems to me that something to
17 reflect upon, is he wants to get back out and become a
18 contributing member of society and I think that the letters
19 reflect that Mr. Zulueta can and will be that type of person.
20 And so the issue is, is 36 months or 33 months or 30 months or
21 what is recommended by the probation office, is one of those
22 going to accomplish the 3553 factors? And I would respectfully
23 submit that it's not. If your sentence is 34 months, or 36
24 months, or in the other range that I have stated, it is not
25 going to cause people not to be deterred and not to commit

M2o5zulS

1 offenses. And we know that through the drug business and drug
2 trade. It is the same thing. People are just -- there will
3 always be people committing violations. But I believe, your
4 Honor, that Mr. Zulueta has a lot to contribute and he can turn
5 his life around. He has got great support from his family, he
6 has got great support by members of the community, and I would
7 respectfully ask you to grant a variance in this case and also
8 to grant the variance in the sentencing guidelines.

9 Thank you.

10 THE COURT: Thank you.

11 Mr. Zulueta, you have a right to address the Court at
12 this point if you would like to do but you are not obligated to
13 do that.

14 Would you like to address the Court?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: All right. It is up to you if you want to
17 stand. If you want, you can go over there, that way you don't
18 have to bend down to the table.

19 THE DEFENDANT: (In English) All my life I tried to
20 do the right thing. I came to this country. This country gave
21 me great opportunity. Great opportunity. I made mistake. I
22 take responsibility. I am sorry for all the people I hurt.

23 Thank you, your Honor.

24 THE COURT: Thank you, Mr. Zulueta.

25 I will now describe the sentence that I intend to

M2o5zulS

1 impose. Obviously the attorneys will have a final opportunity
2 to make legal objections before I finally impose sentence.

3 As I have said on the record already, I agree with the
4 parties -- both parties and probation -- that the guidelines
5 range is 33 to 36 months, not 30 to 36, as set forth in the
6 plea agreement. Neither party objected to that. I asked
7 repeatedly and Mr. Goldman has said he is not raising an
8 objection. Nevertheless, he argued to me that I should somehow
9 depart and I will deal with that in a moment. In terms of my
10 own calculation, though, as I say, I do calculate that the
11 range is 33 to 36 months, as follows:

12 The base offense level is six under the sentencing
13 guidelines Section 2N2.1C1 and 2B1.1A2, and that is because
14 Count One, to which Mr. Zulueta pled guilty, is a violation of
15 the FDCA that involves fraud. And the statutory maximum is
16 less than 20 years. The offense level is increased by 14
17 levels according to the loss amount table. The parties have
18 agreed that the intended loss amount was greater than \$550,000
19 but less than \$1.5 million. There is an additional two-level
20 enhancement for Mr. Zulueta's role in the offense because, as a
21 licensed race horse trainer, with custody and charged with the
22 care of other people's animals, he abused that position of
23 trust.

24 I have taken into account the two-level reduction for
25 acceptance of responsibility under Section 3E1.1(a) of the

M2o5zulS

1 guidelines and if I did not, I hereby grant the government's
2 motion for a further one-level reduction based on Mr. Zulueta's
3 giving timely notice of his intent to plead guilty under
4 Section 3E1.1(b). That results in a total offense level of 19.

5 As I have previously said, the plea agreement
6 calculation was based, at least in part, on representations
7 that the defense made to the government prior to entry into
8 that plea, that Mr. Zulueta had no prior criminal history and
9 therefore the parties in the plea agreement used no criminal
10 history points putting him in Criminal History Category I.

11 MR. GOLDMAN: Your Honor, may I interrupt? I did not
12 make recommendations, just so you know that so that's clear.

13 THE COURT: I'm sorry?

14 MR. GOLDMAN: I did not make representations to the
15 government on -- in getting this plea agreement. I did not
16 make representations to the government about the criminal
17 record of my client.

18 THE COURT: Let me just find the plea agreement.

19 MR. GOLDMAN: It was drafted by the government, I made
20 no representation. I was unaware of what his criminal history
21 was at the time and what is typically done is the government,
22 who has the resources, knows what the criminal history is of a
23 defendant and they drafted that language and it was acceptable
24 to me. I did not make any false representations or any
25 representations to the government about criminal history.

M2o5zulS

1 THE COURT: All right. Your comments are noted.

2 I will note for the record the plea agreement recites,
3 on page 3, under Criminal History Category: Based upon the
4 information now available to this office, this office having
5 previously been defined as the United States Attorney for the
6 Southern District of New York ("including representations by
7 the defense"). And it goes on to then find the defendant has
8 zero criminal history points.

9 MR. GOLDMAN: It is form language, your Honor.

10 THE COURT: Excuse me, Mr. Goldman. Don't keep
11 interrupting me. You have already said that.

12 This form language was signed by Mr. Zulueta and
13 approved, expressly by you, and I specifically confirmed that
14 during the plea hearing. So if it's form language which you
15 disagree with, you shouldn't have signed it and approved it and
16 you should have advised your client contrary.

17 In any event, the parties now agree, so I don't know
18 why we are having a debate about this, the parties now agree
19 that probation correctly assessed three criminal history points
20 which place Mr. Zulueta in Criminal History Category II.

21 Mr. Zulueta was arrested three times in 2018, all in
22 Pennsylvania where he resides. First he was arrested and
23 convicted of disorderly conduct and fined for getting into a
24 fight but this offense did not warrant any criminal history
25 points in the calculation. Second, he was arrested and

M2o5zulS

1 convicted of harassment and fined again for an altercation that
2 involved violence or the threat of violence, but Second Circuit
3 precedent establishes that a harassment conviction does not
4 warrant any criminal history points. Third, Mr. Zulueta was
5 arrested for DUI. He was sentenced to probation and the PSR
6 finds, as do I, that that warrants one criminal history point.

7 Moreover, there are an additional two criminal history
8 points because the offense in this case was committed while
9 Mr. Zulueta was under a state probation term. That results in
10 a total of three criminal history points putting Mr. Zulueta in
11 a Criminal History Category of II.

12 Under the sentencing guidelines a total offense level
13 of 19 and a Criminal History Category of II results in a
14 guideline range of 33 to 41 months. However, since
15 Mr. Zulueta's statutory maximum for the crime to which he pled
16 guilty is three years, the guidelines range is 33 to 36 months
17 of imprisonment.

18 Now, Mr. Goldman is correct that the PSR takes the
19 position that the defendant's Criminal History Category may
20 substantially overrepresent the seriousness of defendant's
21 criminal history and may warrant a departure, even though the
22 defendant agreed in the plea agreement that he would not
23 request a downward departure and did not object to and in fact
24 concurs in the calculation of the guidelines range. Counsel
25 has now asked me to depart and adopt the PSR position that a

M2o5zulS

1 departure is warranted with respect to the Criminal History
2 Category.

3 As I have said previously, I deny that request. You
4 have agreed that the criminal history calculation is correct
5 and I do not believe you are correct that that DUI is not
6 something I can consider as part of the overall mix of
7 information relevant to sentencing. I do not agree, in any
8 event, that any departure is warranted on the facts before me.

9 While Mr. Zulueta, his record for the DUI may have
10 been expunged, if that's what you are telling me, nevertheless
11 he was on probation with regard to that offense and probation
12 required that he stay out of trouble. He nevertheless
13 continued the criminal course of conduct which led to his
14 guilty plea in this case, conduct that he admitted at the time
15 of his plea he knew was wrong and illegal. I believe that his
16 Criminal History Category appropriately reflects the
17 seriousness of committing a crime while on probation.

18 I similarly do not see any reason -- I have given you
19 my guidelines calculation which, as I say, is in accord with
20 what's in the PSR. I have also considered, as I must, the
21 factors under Section 3553(a).

22 Taking all of those factors into account, I do not see
23 any reason to vary downward from the range of 33 to 36 months.
24 The reality is that Mr. Zulueta was placed in a position of
25 trust with respect to the horses under his care. The offense

M2o5zulS

1 that he has committed is serious and the record reflects a
2 certain callousness, frankly, about the harm to the animals
3 placed under his care, particularly in the intercepted calls
4 back and forth with Mr. Navarro. There is also obviously
5 complete disregard for the well-being of the other horses
6 competing against Mr. Zulueta's horses and the jockeys who were
7 riding his horses, and other horses, and could have been very,
8 very seriously injured.

9 Clearly, Mr. Zulueta had a difficult upbringing and it
10 is commendable that he came to the United States, he worked
11 hard, he provided for his family. He does appear to be a
12 loving family man who is admired by a number of people. I
13 think if I add up the count, there are roughly 16 or 15 letters
14 in support of Mr. Zulueta. I do believe that he has the
15 ability, still, to contribute to the community and to achieve
16 the American dream but he, himself, said he came here, he was
17 given tremendous opportunities, and instead of maximizing on
18 those opportunities, while he did work hard, as do all people,
19 frankly, in the business of caring for horses, he abused that
20 opportunity, frankly, and he took active steps to hide what he
21 was doing, none of which, frankly, has been acknowledged in
22 anything I have seen in the record. The plea allocution talks
23 about getting drugs from Mr. Cohen. There was no mention
24 whatsoever of the interaction with Mr. Navarro which is, quite
25 frankly, shocking and egregious at the level of callousness

M2o5zulS

1 that I see in the dialogue back and forth between the two of
2 them. At times it appears that Mr. Zulueta was actually
3 educating Mr. Navarro about new and experimental ways to drug
4 horses and telling him -- telling Navarro -- about the need to
5 be careful to hide what they were doing so that they would not
6 be caught by drug enforcement and horse racing authorities.

7 Now, I do recognize clearly, in terms of relative
8 degrees of culpability, which is a factor that I do need to
9 take into account and I am taking into account, that
10 Mr. Zulueta is relatively less culpable than some of the other
11 defendants in this case, and I certainly have and will take
12 that into account in terms of the sentence that I intend to
13 impose.

14 My intent is to, taking all of the 3553 factors into
15 account after doing my own guidelines calculation, I cannot
16 ignore either the need to deter further criminal conduct not
17 necessarily by this defendant but by others who might think
18 about engaging in similar wrongdoing, and to promote respect
19 for the rule of law and provide just punishment. For all of
20 those reasons it is the intent of the Court to sentence
21 Mr. Zulueta within the guidelines range. I intend to sentence
22 him to 33 months of imprisonment.

23 I previously signed a forfeiture order. Pursuant to
24 the plea agreement Mr. Zulueta agreed to forfeit \$47,525. That
25 order will be part of the judgment in this case. Based on the

M2o5zulS

1 record presented to probation and counsel's arguments to me
2 including that Mr. Zulueta has used up his savings and sold his
3 home and some of his equipment in order to stay afloat, I do
4 find that he is unable to pay any fine so it would not be my
5 intent to impose a fine.

6 There is, as I think you know, a mandatory \$100
7 special assessment for each count to which he is pleading
8 guilty.

9 So, in addition, I would impose a one-year term of
10 supervised release. It would be my intent to impose the
11 special conditions that are set forth on page 39 of the PSR and
12 a couple of additional conditions.

13 I do have one question for counsel. Did Mr. Zulueta
14 surrender his passport?

15 THE DEFENDANT: (In English) Yes.

16 MR. GOLDMAN: Yes, your Honor.

17 THE DEFENDANT: (In English) Yes.

18 THE COURT: It is in the possession, then of
19 probation?

20 MR. GOLDMAN: I believe in Philadelphia, your Honor.
21 He appeared in Philadelphia.

22 THE COURT: Yes, but to the probation people there?

23 MR. GOLDMAN: Yes; pretrial services.

24 THE COURT: So I would intend to impose the following
25 special conditions:

M2o5zulS

1 One, that Mr. Zulueta be supervised when he is
2 released by the district of his residence.

3 Second, if the probation officer determines, based on
4 his criminal record, personal history, or characteristics that
5 he poses a risk to another person including any organization,
6 the probation officer, with the prior approval of the Court,
7 may require him -- Mr. Zulueta -- to notify -- I'm sorry -- I
8 may require the probation officer to notify that Mr. Zulueta
9 notify the other person about the potential risk and that he
10 comply with any instructions from the probation officer, and
11 the probation officer may contact the person and confirm that
12 notice has been provided of any risk.

13 I had previously imposed a condition, it is not
14 contained in the PSR, but I would intend to include this in the
15 final judgment: That the defendant must comply with the rules
16 and regulations of any licensing regime to which he is subject,
17 including appearance at any disciplinary proceedings, if
18 required, consistent, of course, with his constitutional rights
19 to the extent he has any that are implicated and that he wishes
20 to assert them.

21 I would also add two additional conditions that were
22 not outlined in the PSR. One is that the defendant must
23 provide Probation with access to any requested financial
24 information and must not incur new credit card charges or open
25 any additional lines of credit without the approval of the

M2o5zulS

1 probation officer, unless he is in compliance with the payment
2 schedule for the forfeiture amount to which he agreed and which
3 I have ordered.

4 I would also add a search condition; that Mr. Zulueta
5 must submit his person and any property, residence, vehicles,
6 papers, computers, or other electronic communication, data
7 storage devices, cloud storage, or media, and effects, to
8 search by any United States probation officer and, if needed,
9 that officer can enlist the assistance of law enforcement. The
10 search would be conducted when there is reasonable suspicion
11 concerning violation of a condition of supervision or unlawful
12 conduct by Mr. Zulueta. Failure to submit to a search may be
13 grounds for risk indication of release. Mr. Zulueta would be
14 obligated to warn any other occupants of his premises that the
15 premises may be subject to search pursuant to this condition.
16 Any search would need to be conducted at a reasonable time and
17 in a reasonable manner.

18 Mr. Chow, I assume there is no restitution in this
19 case?

20 MR. CHOW: That is correct.

21 THE COURT: It is the intent of the Court then that I
22 would not be obviously entering any restitution order. As I
23 said, I do not intend to impose a fine.

24 Does the government know of any legal reason that this
25 sentence may not be imposed?

M2o5zulS

1 MR. CHOW: No, your Honor.

2 THE COURT: Mr. Goldman?

3 MR. GOLDMAN: No, your Honor.

4 THE COURT: Mr. Zulueta, would you please stand?

5 It is the judgment of the Court that you be imprisoned
6 for a term of 33 months. That term would be followed by one
7 year of supervised release on the special and mandatory
8 conditions set forth in the PSR and on the special conditions
9 that I have just outlined on the record. The forfeiture order,
10 the preliminary order I previously entered requiring you to
11 forfeit the amount of \$47,525, is incorporated into my
12 judgment. I am not imposing any fine or restitution. There is
13 a mandatory \$100 special assessment, payable immediately.

14 You may be seated, sir.

15 It is Court's view that Mr. Zulueta is a worthy
16 candidate for voluntary surrender. I assume there is no
17 objection by the government?

18 MR. CHOW: No, your Honor.

19 THE COURT: Mr. Goldman, is there any request with
20 regard to facilities that you would like me to include in the
21 judgment?

22 MR. GOLDMAN: Yes, your Honor. Yes; there is a
23 federal facility Fairton, New Jersey, and is close proximity to
24 family and loved ones.

25 THE COURT: I will include that recommendation in my

M2o5zulS

1 judgment.

2 As I think you know, Mr. Goldman, Mr. Zulueta may
3 not -- a designation of a facility is wholly within the
4 authority of the Bureau of Prisons. I do not have authority to
5 dictate what facility you should be sent to, but I certainly
6 will make that request.

7 MR. GOLDMAN: Thank you, your Honor.

8 THE DEFENDANT: (In English) Thank you.

9 THE COURT: You're welcome, sir.

10 Does the government move to dismiss my open counts?

11 MR. CHOW: Yes. At this time the government would
12 move to dismiss all open counts against Mr. Zulueta.

13 THE COURT: Then are you able to tell me, for the
14 record, what those are?

15 MR. CHOW: I believe it is the original and then the
16 S1 indictment.

17 THE COURT: Mr. Zulueta, I need to advise you at this
18 time that to the extent you haven't waived it in your plea
19 agreement, you do have the right to appeal from conviction and
20 from the sentence that I have just imposed. If you are unable
21 to pay the costs of an appeal, you may apply for leave to
22 appeal in forma pauperis. Any notice of appeal must be filed
23 within 14 days of the judgment of conviction. We try very hard
24 to get the judgments entered the same day as sentencing --
25 although I do have a full calendar today -- but that judgment

M2o5zulS

1 will be entered either later today or tomorrow, so the clock
2 for any appeal will begin to run at that time and you have 14
3 days.

4 So the Bureau of Prisons, I am advised by probation,
5 that the Bureau of Prisons requires roughly 90 days in order to
6 review the record and to designate a facility, so I order that
7 you surrender, as directed, by the Bureau of Prisons, on May
8 24th, in accordance with the instructions that will be
9 provided.

10 Mr. Zulueta, as I said, in reviewing the record I do
11 acknowledge that you are obviously a hard-working person. You
12 do genuinely seem to appreciate the opportunity that was given
13 to you in coming to this country and in becoming a citizen.
14 This is the greatest country in the world and it affords
15 unbelievable opportunities to people. I think you know that,
16 sir. You went a stray over the course of several years but you
17 have your whole life ahead of you, and it is up to you what you
18 are going to make of your life going forward. So, I wish you
19 well. I hope that I will not see you back before me in
20 connection with any violations regarding this case or any other
21 case, and that you will find the right path forward and stay
22 out of trouble.

23 Is there anything further for the record, Mr. Chow?

24 MR. CHOW: No, your Honor.

25 THE COURT: Mr. Goldman?

M2o5zulS

1 MR. GOLDMAN: No, your Honor.

2 THE COURT: I thank our court reporter very much, and
3 we are adjourned.

4 Thank you to the interpreter as well.

5 We are adjourned.

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